FILE COPY

Office-Supreme Court, U.S.
FILED
NOV 25 1959
JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 542

AL MARSHALL, ET AL,

Petitioners

v.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, ET AL,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

JOSEPH L. RAUH, JR.,
JOHN SILARD,
1631 K Street, N.W.,
Washington, D. C.
Attorneys for Petitioners.

TABLE OF CONTENTS

	Page
Opinion Below	1
Jurisdiction	2
Question Presented	2
Statement	2
1. The Taking of Petitioners' Mileage and Pay by the Brotherhood's Introduction of a "Swing Man"	5
2. Racial Discrimination Demonstrated at the Trial	7
(i) Only Negro firemen reduced in pay	7
(ii) Only white firemen benefit from Negroes' loss	8
3. The Opinion of the District Court	10
Reason for Granting the Writ	13
The Lower Court's Complete Disregard of the Landmark *Steele* Ruling Deprives Negro Firemen of Their Last Remaining Protection Against the Depredations of Their All-White Statutory Bargaining Representative	13
Conclusion	17
Appendix A	19
Appendix B	20

TABLE OF CASES

Brotherhood of Railroad Trainmen v. *Howard*, 343 U.S. 768	14
Conley v. *Gibson*, 355 U.S. 41	14
Graham v. *Brotherhood of Locomotive Firemen and Enginemen*, 338 U.S. 232	3, 14
Oliphant v. *Brotherhood of Locomotive Firemen and Enginemen*, No. 560, October Term, 1958	4, 5, 18
Oliphant v. *Brotherhoood of Locomotive Firemen and Enginemen*, 6 Cir., 1958, 262 F. 359	19
Steele v. *Louisville & Nashville R. Co.*, 323 U.S. 192	3, 13, 14, 16, 18

Page

Tunstall v. *Brotherhood of Locomotive Firemen and Enginemen*, 323 U.S. 210 ..... 3, 14

Washington v. *Central of Georgia Ry.*, M.D.Ga., 1959 [opinion dated June 27, 1958], — F.Supp.— 19

MISCELLANEOUS

28 U.S.C. 1254(1) 2

Railway Labor Act 2

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No.

AL MARSHALL, ET AL,

Petitioners

v.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, ET AL,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioners pray that a writ of certiorari issue to review the judgment in this case of the United States Court of Appeals for the Fifth Circuit.

Opinion Below

The opinion of the United States District Court for the Middle District of Georgia appears at pp. 610-628 of the

record and is reported at 174 F. Supp. 33. The judgment of the United States Court of Appeals for the Fifth Circuit, which is not reported, appears in Appendix A, *infra*, p. 19).

Jurisdiction

The judgment of the Court of Appeals for the Fifth Circuit was entered on July 2, 1959 (opinion dated June 30). On July 28, 1959, that Court denied a timely petition for rehearing. The time for the filing of this petition was extended by an order of Mr. Justice Black to and including November 25, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Question Presented

Is it a violation of an injunction issued under the *Steele* doctrine for the Brotherhood of Locomotive Firemen and Enginemen to take mileage and pay away from senior Negro firemen and give it to junior white firemen, particularly where the adversely affected Negroes are excluded from membership in the all-white Brotherhood and where they are even denied any prior notice or hearing on the action taken against them by the Brotherhood?

Statement

This case presents a new chapter in the sordid story of racial discrimination against Negro locomotive firemen by the all-white Brotherhood of Locomotive Firemen and Enginemen, their collective bargaining representative under the Railway Labor Act. After decades of covert discrimination against the Negro firemen, the Brotherhood was emboldened in 1941 to force an overtly discriminatory agreement, the Southeastern Carriers Conference Agreement, upon the southern railroads. That agreement was a deliberate effort to deprive Negro firemen of the job rights

to which they were entitled by their long years of service on the railroads. In *Steele* v. *Louisville & Nashville R. Co.*, 323 U.S. 192 (1944) and *Tunstall* v. *Brotherhood of Locomotive Firemen and Enginemen*, 323 U.S. 210 (1944), this Court struck down the discriminatory restrictions of the Southeastern Carriers Conference Agreement in no uncertain terms, holding that the Brotherhood had violated its duty of equal and nondiscriminatory representation of the Negro firemen for whom it is the exclusive statutory bargaining representative.

When discriminations by the Brotherhood continued unabated even in the face of these definitive rulings, this Court was forced once more to condemn the Brotherhood's discriminations, finding that they constituted "a continuing and willful disregard of rights which this Court in unmistakable terms has said must be accorded to Negro firemen." *Graham* v. *Brotherhood of Locomotive Firemen and Enginemen*, 338 U.S. 232, 234 (1949).

Thereafter, faced with this third defeat in this Court, the Brotherhood finally settled the numerous pending discrimination cases by consenting to the entry of permanent federal injunctions. These injunctions implement this Court's decisions in *Steele*, *Tunstall* and *Graham* by forbidding any further discrimination against the Negro firemen whom the Brotherhood is obligated to represent equally and nondiscriminatorily under the Railway Labor Act. Thus, the 1952 consent injunction entered in the United States District Court for the Middle District of Georgia in the *Washington* case (R. 611), the injunction upon which this civil contempt proceeding is based, restrains the Brotherhood and the Central of Georgia Railway from enforcing any

> "(a) . . . written or oral agreements, or carrying on any practices under such agreements, insofar as said agreements or practices discriminate, on the ground.

of their race or color, against Negro firemen in their employment or occupation as firemen on steam locomotives or as helpers on diesel locomotives, or (b) from denying to plaintiffs or other members of their class their respective rights to assignments as firemen on steam locomotives or as helpers on diesel locomotives based upon seniority and qualifications because they are Negroes. . ."

Unfortunately, the entry of the injunctions did not end Brotherhood discrimination against the Negro firemen.[1] While the Brotherhood had learned after three trips to this Court to avoid overtly discriminatory agreements, it continued its inroads upon the jobs and the pay of Negro workers by means more subtle but no less effective. Methods used by the Brotherhood to defeat the seniority rights of the Negroes under the consent injunctions have been both general and specific. Thus, the Brotherhood has entered into general agreements with the railroads, reducing or limiting the work of firemen, where such reductions and limitations are certain to weigh most heavily upon the older and higher seniority Negro firemen who hold the choice jobs with the most mileage. Where this has not satisfied the appetite of the junior white firemen, the Brotherhood has made specific incursions upon the mileage and pay of particular Negro firemen, as evidenced by this case.[2]

Faced with continuing inroads upon their jobs and live-

---

[1] Insight into the post-injunction attitude of some powerful Brotherhood officials in the South may be gained from the statement of a Brotherhood General Chairman to a Negro fireman concerning one such injunction entered by Federal District Judge Mullins—"Judge Mullins gave it to you but I will sure as hell see you don't keep it." J.A. 75, *Oliphant* v. *Brotherhood of Locomative Firemen and Enginemen*, No. 560, October Term, 1958.

[2] See also, discriminations set forth in the record of the *Oliphant* case, *supra*, n. 1.

lihood, despite the injunctions intended to protect their seniority, the Negro firemen as a group sought admission to the Brotherhood. They hoped that, through a measure of internal political power within the Brotherhood, Negro firemen could directly protect themselves against discrimination. Turned down for membership, they filed a class action in 1954 to compel their admission into the Brotherhood. However, their class suit to accomplish this, *Oliphant* v. *Brotherhood of Locomotive Firemen and Enginemen*, failed when this Court refused review "in view of the abstract context in which the questions sought to be raised are presented by this record." 359 U.S. 935; rehearing denied, 359 U.S. 962.

In the present posture Negro firemen continue, fifteen years after *Steele*, to be subjected both to complete exclusion *from* the Brotherhood and to discriminatory bargaining representation *by* the Brotherhood. Negro firemen are thus relegated to this Court's enforcement of the *Steele* doctrine as the sole means for the protection of their jobs and livelihood against continuing Brotherhood depredations on behalf of white Brotherhood members. The question so forcefully presented by the instant case is whether the *Steele* doctrine and the implementing injunctions afford any real protection to Negro firemen against the Brotherhood's expropriation of their earnings for the benefit of the Brotherhood's own white members.

1. *The Taking of Petitioners' Mileage and Pay by the Brotherhood's Introduction of a "Swing Man"*

The act which gives rise to this civil contempt action was the Brotherhood's 1957 introduction of a "swing man" on a five-man assigned run on the Central of Georgia Railway from Columbus to Birmingham, a run held at that time, and traditionally held for over 20 years, by Negro firemen (R.

392-93; 612).[3] Petitioners are the five Negro firemen who share the assigned run on which the swing man was added in March, 1957, and continues to operate today; four times a month this extra man takes a turn from each Negro fireman, representing a loss of approximately 500 miles and $100 a month for each petitioner (R. 612-613). Since petitioners are Negroes, they are barred by the Constitution of the Brotherhood from membership therein and thus from participation in Brotherhood deliberations; moreover, they were not consulted about and had no voice in the Brotherhood's negotiation of the swing man agreement with the railroad which has resulted in a regular monthly reduction in their mileage and pay (R. 119, 161, 456). The first they knew of their loss of earnings was when the swing man was assigned to their run by notice on the bulletin board (id.).

Having no remedy inside the union, the five Negro firemen turned to the federal court wherein the injunction following *Steele* had been issued for their protection. The *Washington* case, in which this injunction had been entered in 1952, was a class action on behalf of Negro firemen employed on the Central of Georgia Railway. On December 18, 1957, petitioners, members of that class, filed in the District Court a motion to intervene in that suit, and to be permitted to file a petition for a rule to show cause why the Brotherhood should not be held in civil contempt for

[3] Jobs are assigned on the railroad on the basis of competitive bidding and award to the bidder with the highest seniority. The reason why the particular "run" here involved has traditionally been held by Negro firemen is that this run is one of the choice assignments on the Columbus Division and, as such, Negro firemen who hold top seniority have successfully bid on it through the years. Negro firemen hold the top seniority because they have traditionally been denied promotion to engineer and have thus stayed on as firemen, accumulating highest seniority while white firemen became engineers. Thus in 1957, in the Columbus Division of the Central, the Division here involved, the 22 Negro firemen were all senior to 64 of the 66 white firemen in the Division. See Appendix B, *infra*, p. 20.

violation of the injunction in the *Washington* case.[4] Their intervention was allowed, their petition was filed, and a rule to show cause was issued (R. 5-23).

2. *Racial Discrimination Demonstrated at the Trial*

At the trial, petitioners demonstrated that the taking of their traditional earnings by the introduction of a swing man on their assigned run on the Columbus Division is racially discriminatory in that only Negro firemen have been reduced in mileage and pay and the reduction has been accomplished for the exclusive benefit of junior white firemen.

(i) *Only Negro firemen reduced in pay.* Petitioners showed that their mileage and pay has been materially reduced by the swing man put on their run, a run traditionally held by Negroes because it is a highly desirable assignment on which Negro firemen with top seniority have top bidding rights (R. 392-93; 542-43). Petitioners showed that a swing man had at the same time been put on another Negro-held run in the Columbus Division and that no swing man has been put on to reduce the mileage of any white firemen (R. 130 et seq., 162).[5] Indeed, petitioners showed that the Brotherhood has not by any device, swing man or otherwise, reduced the actual mileage or pay of a single white fireman on their division (R. 130 et seq., 162).

[4] While the petition was also addressed to the Central of Georgia Railway, during the trial the railroad moved for, and petitioners consented to, the release of the Central of Georgia from any liability and the Court thereupon entered an order exonerating the Central (R. 609, 617). The discrimination which gives rise to the present action, just as the discriminations of the Southeastern Carriers Conference Agreement, was initiated not by the railroad but by the Brotherhood, and it is the Brotherhood rather than the railroad which is therefore chargeable.

[5] Petitioners also showed that no other swing men have been put on any run on any division of the Central since 1951, when a swing man was added to a run shared by five Negro firemen on the Savannah Division (R. 162; 176-77; 399).

All of this proof was completely uncontradicted by the Brotherhood. In its lengthy defense, the Brotherhood was unable to produce a single instance where a swing man has been put on a run held by white firemen (see R. 396-402). And it failed to produce even a single instance in which it has reduced the mileage of a white fireman on petitioners' division.[6] Thus, A. B. Healan, the Brotherhood's General Chairman on the Central of Georgia Railway, and its chief witness below, conceded on cross-examination (R. 446-53) that the Brotherhood had not produced a single instance on the Columbus Division where it has reduced the mileage of a white fireman (R. 449). And the same witness conceded that the Brotherhood had not adduced a single example that it had "*added a man to distribute the work of other men on the Columbus Division . . . except where it was distributing the work of men who were colored firemen*" (R. 452-53).

(ii) *Only white firemen benefit from Negroes' loss.* Not only did petitioners show that the Brotherhood has reduced the mileage and pay only of the Negro firemen, but they showed on the basis of the race-seniority distribution of firemen on the Columbus Division, where the 22 Negroes are all at the very top of the seniority roster of 88 firemen (see Appendix B, *infra*, p. 20), that every reduction in the mileage and pay of Negroes, including that to which petitioners have been subjected, goes to the benefit of junior white firemen (R. 132-35; 402-408). Indeed, the Brotherhood's witness, General Chairman Healan, conceded as much (R. 407-408):

---

[6] A single alleged exception on the *Cedartown* District of the Columbus Division (petitioners are on the *Columbus* District of the Columbus Division), where respondents claim reduction in the pay of three white firemen, is discussed *infra* at n. 9, p. 12, where it appears from stipulated payroll figures that there was actually no loss whatever in pay to white firemen.

"Q. And you also testify that when a swing man is cut in on the Columbus Division it necessarily either keeps a white man from having to go out of work or puts a white fireman back into work who is not working, on this division?

"A. That's true, that's true.

"Q. And that was necessarily the effect of cutting a swing man in last year on this run?

"A. That's spreading the work, that's right.

"Q. In other words Negroes, or primarily Negroes, on the Columbus Division had work taken away from them last year when the swing man was added, and whites and exclusively whites were benefited. Isn't that true?

"A. That's true. . ."

In sum, the record makes clear and the Brotherhood conceded at the trial, that when the extra job was carved out of the mileage and pay of the five Negro petitioners, the additional mileage and pay went to junior white firemen. The Brotherhood's introduction of a swing man thus demonstrably constituted selective diminution of the pay of senior Negro firemen, admittedly for the benefit of junior white Brotherhood members.[7]

[7] Petitioners showed also that the reduction aggravated an already serious discrimination against Negro firemen by virtue of the denial of opportunity to add to their pay by exercising engineering seniorities; the stipulated payroll records introduced at the conclusion of the trial (R. 553) make this existing discrimination clear. The payroll mileage and pay records show that of the 66 white firemen regularly employed in 1957 on the Columbus Division, 61 added to their mileage and pay by exercising seniority as engineers, hostlers, etc., while not a single Negro fireman could add a dollar to his pay by working in any capacity other than as a fireman.

Some striking examples from the stipulated payroll of the dual seniority available to white firemen may be found in cases such as those of white fireman R. B. Gable, Jr., who added $2,873.71 in 1957 to his firing pay by exercising engineering seniority during the same months that he worked as a fireman; by white fireman D. R. Cruise, who added $4,482.69 by a similar exercise of double seniority; and by white firemen D. H. Greene,

3. *The Opinion of the District Court*

The District Court's opinion recognizes the validity of much of petitioners' demonstration. The Court found that petitioners are entitled to all the protections of the *Washington* injunction, which forbids discriminatory inroads upon the seniority rights of the Negro firemen (R. 612); it recognized that, having traditionally been denied promotion to engineer, "Negro firemen have become the senior firemen having the right to choice runs and all other rights accompanying high seniority" (id.); it found that for 20 years or more petitioners' assigned run has been shared by senior Negro firemen, who have now been seriously reduced in their monthly pay by the introduction of the swing man on their run (id.); and, finally, the Court conceded that the reduction in petitioners' mileage goes to "*benefit a junior white fireman*" (R. 625). Despite all of this, and despite the District Court's explicit cognizance of the exclusion of petitioners from membership in the Brotherhood (R. 612), the Court, flouting both the letter and spirit of *Steele*, refused to find any violation of an injunction whose very purpose was to safeguard the seniority rights of the Negro firemen against further white Brotherhood incursions:

(i) As concerns petitioners' demonstration that the Brotherhood has reduced the mileage and pay only of Negro firemen, the District Court first referred to a national policy of the Brotherhood of "distributing the work among firemen" (R. 618). The Court accepted the Brotherhood's unsupported allegation that the reduction in petitioners' mileage and pay was effected pursuant to that national pol-

---

T. J. Murphy, J. S. Holland, E. M. West, J. O. Landrum, C. M. Maxwell, Jr., E. C. Cannon, Jr., A. M. Wilson, Jr., R. E. Nash, J. F. Tracey, and J. K. McLendon, all of whom added more than $2,000.00 during 1957 to their firing pay by exercising engineering seniority at the same time.

icy of reduction.[8] But the briefest examination of the Brotherhood's evidence in this respect shows that the alleged nationwide policy does not justify the introduction of a swing man on the Columbus Division who reduces both the mileage *and pay* of Negro firemen (R. 225-228). The 1953 policy declaration relied upon by the Brotherhood refers to "reduced mileage in road service *without reduction in pay*" (R. 225). And the notice served on the carriers on January 15, 1956 was likewise "to reduce the mileage in road service *without reduction in pay*" (R. 227). As the Court itself remarked, "that was a proposal to reduce the minimum mileage . . . but not to reduce the pay." (R. 226). Thus on its face the reduction in the mileage and pay of petitioners is a "reduction in pay" utterly inconsistent with what the Brotherhood alleges to be the national policy of reduced work.

(ii) The Court next recited five instances of mileage reduction on divisions and districts of the Central of Georgia *other* than that upon which petitioners are employed, where, it is contended by the Brotherhood, white firemen have been forced to take a reduction in mileage and pay (R. 621-622). In so doing, the Court overruled petitioners' objection that these five isolated instances, the only ones the Brotherhood was able to adduce in its entire defense, represent only *hypothetical* mileage rather than *actual* miles and dollars earned by individual white firemen. Petitioners had pointed out to the Court that these hypothetical mileage figures, which omit the additional mileage and pay that white firemen (but not Negro firemen) can earn as engineers (see supra, n. 7, p. 9), give the entirely false impression that the individual white firemen have lost mile-

[8] The Court made no reference to the fact that, as Negroes excluded from the Brotherhood and given no prior notice, petitioners never had any voice either in the formulation or implementation of that or any other Brotherhood "policy".

age and pay, whereas in fact no net reduction has been suffered by them at all. Thus, in the single one of the five hypothetical instances of "reduction" on which petitioners were able to obtain the payroll for the white firemen involved, petitioners showed that the particular white firemen did not sustain any loss in pay but, on the contrary, by accumulating engineering mileage during the month, they actually *increased* their net pay at the time of their hypothetical reduction.[9]

On these weak reeds of an inapplicable national policy and a hypothetical (and non-existent) pay loss to white firemen, the District Court refused to find that the admitted taking of Negro earnings for the admitted benefit of junior whites was racially discriminatory and a violation of the *Steele* injunction. On July 14, 1958, the Court dismissed the rule *nisi* and the motion to hold respondents in civil contempt (R. 628-629). On July 2, 1959, the Court of Appeals, without analysis or opinion, affirmed the judgment of the District Judge "on the basis of his reported opinion below". The court below, turning its back on *Steele*, thus held that Negro firemen may be stripped of their traditional seniority

[9] According to the Brotherhood's testimony accepted by the District Court, by the addition of an extra white fireman in August of 1957, three white firemen were reduced in the Cedartown pool from a previous half-monthly mileage of 2329 to 1547; with an alleged resulting loss to each of 773 miles (R. 594-597). The three white firemen were identified as C. Williams, Carter and H. Y. Stevens (R. 601-603). However, examination of the actual payroll figures submitted by the railroad for these three white firemen, shows that C. Williams added to his firing mileage and pay by working both as a hostler and as an engineer during August of 1957, and as a result he made $591 in that month, whereas he had made only $568 in the previous month. Similarly, Carter made $554 during August of 1957, whereas he had earned only $391 in July. Far from being reduced, these two men *increased* their actual pay during the month it is claimed they lost mileage and pay. And H. Y. Stevens, the third white fireman involved, is shown also to have worked dual seniorities in August but to have run only 982 firing miles during that entire month, from which it is apparent that he was not regularly employed in this pool at all during the month he was said to have lost mileage therein.

rights, without notice or hearing, by the taking of their mileage and pay for the benefit of the white Brotherhood's own members.

Reason for Granting the Writ

THE LOWER COURT'S COMPLETE DISREGARD OF THE LANDMARK *STEELE* RULING DEPRIVES NEGRO FIREMEN OF THEIR LAST REMAINING PROTECTION AGAINST THE DEPREDATIONS OF THEIR ALL-WHITE STATUTORY BARGAINING REPRESENTATIVE

Petitioners are the victims of an ugly system of racial discrimination in the exercise of the all-white Brotherhood's exclusive statutory bargaining power. In 1957 the Brotherhood sought some way of increasing the earnings of its white members on petitioners' division of the Central of Georgia Railroad; it found the means in the overnight expropriation, for the benefit of junior white firemen, of the traditional mileage and pay of the most senior Negro firemen in the division. Because Negroes are denied Brotherhood membership, petitioners had no internal political power to prevent this expropriation of their mileage and pay, nor were they even given prior notice or opportunity for hearing before the reduction in their working rights became an accomplished fact. Under these circumstances, unless this Court grants review and reverses, no remedy whatsoever is available to petitioners against this cavalier and discriminatory exercise of the Brotherhood's statutory bargaining power.

Even more important than the impact of the ruling below upon petitioners is the emasculating effect of that ruling upon the essence of this Court's *Steele* doctrine.[10]

[10] The *Steele* doctrine, of course, has its primary significance in the area covered by the United States Court of Appeals for the Fifth Circuit. Thus, if this emasculating decision by the Fifth Circuit is left unchallenged, the *Steele* doctrine will have lost its efficacy in the area where it is most needed.

Fifteen years ago this Court's decisions in *Steele* and *Tunstall* established the requirement that a federally empowered bargaining agent, the same Brotherhood which is respondent herein, is forbidden to discriminate against Negro non-members of the union in the exercise of its exclusive statutory bargaining power. When discriminations continued, particularly in the railroad industry where there is a tradition of white union hostility against the Negro workers, this Court was required on three more occasions to reaffirm and reapply the *Steele* doctrine. *Graham* v. *Brotherhood of Locomotive Firemen and Enginemen*, 338 U. S. 232 (1949); *Brotherhood of Railroad Trainmen* v. *Howard*, 343 U. S. 768 (1952); *Conley v. Gibson*, 355 U. S. 41 (1957). But if the court below is right in finding no discrimination on the present impelling record of disadvantage suffered by Negro firemen at the hands of the all-white Brotherhood, then the hard-won *Steele* injunctions against continued discrimination are of little if any value. For the lower court's refusal to characterize as racial discrimination the gratuitous appropriation by an all-white union of the mileage and pay of Negro workers, throws into doubt the continuing vitality of the very essence of the requirement of nondiscriminatory bargaining representation:

(i) In *Steele* this Court stated that to assure fair and nondiscriminatory representation of persons excluded from membership in the exclusive statutory bargaining representative

> "the union is required to consider requests of nonunion members of the craft and expressions of their views with respect to collective bargaining with the employer and to give them notice of and opportunity for hearing upon its proposed action." 323 U. S. at 204.

In the instant case petitioners were utterly denied opportunity to express their views about, or even advance opportunity to know of, the Brotherhood's agreement with the Central of Georgia Railway to introduce the swing man who reduces their traditional monthly mileage and pay. Thus, in direct violation of the explicit stricture of *Steele*, at no time before the swing man was put on their run to help out junior white firemen did petitioners have any opportunity to protest this drastic overnight reduction in their traditional mileage and pay.

(ii) Moreover, the Brotherhood's expropriation of the pay of Negro firemen is directly contrary to the *Steele* requirement of fair and equal bargaining representation, for the Brotherhood's expropriation was for the sole benefit of its own white membership.

It is conceded on all sides that it is the white firemen who benefit from the Brotherhood's taking of the mileage and pay of petitioners. The Brotherhood's chief witness so testified at the trial. See p. 9, *supra*. The District Court so found (R. 625):

> "To the extent that the addition of a swing man creates one more firing job in the overall firing picture for the benefit of a junior fireman way down on the list, this pay loss does benefit a white junior fireman."[11]

[11] The District Court sought to explain this finding away, stating that the addition of the swing man created a firing job for the benefit of junior white firemen

> "because under the old 50% rule, stricken down by the injunction in this case, over a long period only white firemen were added as employees and so many were added that during the last fifteen years no new firemen, white or colored, have been employed in the Columbus division. The identity of firemen at the bottom of the seniority list, therefore, results from discrimination which antedated the injunction and which the injunction did not undertake to correct except for the future. . . ." (R. 625).

The court's inexplicable dismissal of the fact that the work and pay taken by the Brotherhood from Negroes has been given to junior white firemen,

The Brotherhood, in its Court of Appeals brief (p. 5), was equally candid in making the concession, stating that:

> "The *ultimate* effect of adding a 'swing man' to the appellants' group was to make one new job for a fireman near the bottom of the firemen's roster. This fireman would usually be a white fireman. . . ."[12]

Certainly, the appropriation by the Brotherhood of the traditional mileage and pay of senior Negro firemen, is precluded by *Steele* where the mileage and pay which is taken

---

improperly raises the pre-injunction discriminatory action of the Brotherhood to the status of a post-injunction defense to new discrimination. While the absence of Negro firemen at or near the bottom of the seniority roster is indeed, as the Court states, the result of pre-1952 discriminations by the Brotherhood, it remains a fact that in 1957, with none but white firemen at the lower end of the seniority roster, the Brotherhood chose to take the traditional mileage and pay of the most senior Negroes on the division to distribute it to junior firemen, who are all white firemen. It is bad enough that the Brotherhood was permitted to bar Negroes from being hired as firemen on the division after January of 1941, but it is absolutely intolerable for it now to appropriate the traditional mileage and pay of the most senior Negroes for the benefit of the most junior whites.

[12] Indeed, the Brotherhood not only concedes that the effect of adding a swing man is to benefit junior white firemen; it even admits a deliberate policy of "adjusting" the mileage of the Negroes "to bring them into line with the mileage run by other [white] firemen . . ." (R. 89). How successful this "adjusting" policy has been is easily demonstrated. Thus, the average 1957 earnings of 21 senior Negro firemen on the Columbus Division was $7,008.28 as compared with average earnings of $6,858.22 for 21 senior white firemen on the Division, all of whom were junior to all of the Negroes, in some cases by as much as 25 years. No less than 7 white firemen hired in 1941 or thereafter were able to earn more pay during 1957 than the most senior Negro fireman on the Division, who was hired in 1917.

As always, it is the senior Negroes who are being "adjusted" for the benefit of the junior whites. In the years before *Steele*, they were "adjusted" all the way off the railroads; now that that is illegal, they are being "adjusted" down to and even below the level of junior whites. It is small wonder that Major Simpson, one of the petitioners, should have recalled in his testimony the pre-*Steele* days when Negroes were the extra men and no one ever suggested putting a swing man on to help them out (R. 160-161).

from the Negro firemen is given by the Brotherhood to its own junior white members. Indeed it is difficult to conceive what constitutes discrimination "against Negro firemen in their employment or occupation as firemen", forbidden by the injunction herein, if it is not the Brotherhood's taking of pay from Negroes and giving it to white Brotherhood members.

(iii) If all this were not enough, however, it is also clear that the taking of the mileage and pay of the senior Negro firemen for the benefit of the junior white firemen, was a totally selective inroad upon the earnings of Negroes, for no reduction of any kind has been effected against white firemen. The Brotherhood did not even attempt to demonstrate that any white firemen on petitioners' division have been forced to take a reduction in mileage and pay. All that the Brotherhood could produce was five isolated "hypothetical" reductions effected against white firemen on *other* districts and divisions of the railroad. And even these were found, upon analysis of the payroll, not to be actual reductions in pay for the white workers involved, who, unlike the Negroes, can and do supplement their firing earnings by concurrent employment in engineering capacities. See p. 11, *supra*. *Certainly, when an all-white union, without even notice or hearing, takes the mileage and pay of Negroes for the benefit of its white members, the resulting heavy burden of disproof of discrimination cannot be met by "hypothetical" figures which bear no relationship to actual dollars and cents.*

Conclusion

The palpably discriminatory nature of the Brotherhood's action requires no embellishment. In response to demands of Brotherhood members desiring to earn more money, the Brotherhood has simply taken part of the tra-

ditional earnings of the senior Negro firemen on the division and distributed them among white firemen. This action, undertaken without any comparable reduction in the earnings of white firemen and accomplished without any prior notice or hearing to the adversely affected Negroes, is patently contrary to the basic requirement of this Court's *Steele* ruling. The considerations which rendered that requirement imperative in 1944 continue in all their vigor today, for this Court just last term refused to review the Sixth Circuit's *Oliphant* decision upholding the exclusion of Negro firemen from the Brotherhood and that decision forever binds the class of Negro firemen. The continuing exclusion of the Negro firemen from membership thus renders imperative the most exacting fair and equal representation of their interests by the Brotherhood; and the most vigorous and sensitive enforcement by the federal courts of the *Steele* requirement of equal treatment. Inasmuch as the decision below utterly disregards that requirement, this Court's review is required to preserve the vitality of *Steele* against a debased system of racial paternalism operating under federal law to the continuing disadvantage of Negro railroad workers.

For the foregoing reasons, it is respectfully submitted that the writ of certiorari should be granted.

JOSEPH L. RAUH, JR.,
JOHN SILARD,
1631 K Street, N.W.,
Washington, D. C.
Attorneys for Petitioners.

APPENDIX A

Before JONES, BROWN and WISDOM, Circuit Judges

PER CURIAM: This is a suit for civil contempt brought by five Negro firemen against the Railroad and Brotherhood based upon a prior consent injunction prohibiting racial discrimination in the job assignments of Negro firemen employed by Appellee Railroad.

The background facts, analysis of issues, and reasoning have been fully and accurately set forth by District Judge Bootle, and his fact findings amply satisfy the clearly erroneous test of F.R.Civ.P. 52(a). Accordingly we affirm the judgment finding no discrimination under these circumstances on the basis of his reported opinion below. *Washington* v. *Central of Georgia Ry.*, M.D.Ga., 1959 [opinion dated June 27, 1958], —— F. Supp. ——. See also *Oliphant* v. *Brotherhood of Locomotive Firemen and Enginemen*, 6 Cir., 1958, 262 F.2d 359, cert. denied, 1959, —— U.S. ——, 79 S.Ct. 648, 3 L.Ed.2d 636.

AFFIRMED.

(June 30, 1959.)

APPENDIX B

Firemen's Race-Seniority Distribution on the Columbus Division (1957)

1. May 1917	X	31. May 1941		61. March 1943	
2. August 1917	X	32. July 1941		62. April 1943	
3. December 1919	X	33. July 1941		63. May 1943	
4. March 1921	X	34. July 1941		64. May 1943	
5. March 1923	X	35. September 1941		65. June 1943	
6. September 1923	X	36. September 1941		66. July 1943	
7. January 1925	X	37. September 1941		67. September 1943	
8. March 1925	X	38. October 1941		68. October 1943	
9. June 1925	X	39. October 1941		69. December 1943	
10. September 1925	X	40. November 1941		70. January 1944	
11. December 1936	X	41. November 1941		71. January 1944	
12. January 1937	X	42. November 1941		72. February 1944	
13. January 1937	X	43. January 1942		73. March 1944	
14. August 1938	X	44. January 1942		74. April 1944	
15. August 1938	X	45. January 1942		75. May 1944	
16. July 1939	X	46. March 1942		76. May 1944	
17. December 1939	X	47. April 1942		77. November 1944	
18. December 1939		48. April 1942		78. December 1944	
19. January 1940	X	49. June 1942		79. December 1944	
20. January 1940	X	50. July 1942		80. April 1945	
21. December 1940		51. September 1942		81. April 1945	
22. January 1941	X	52. September 1942		82. June 1945	
23. January 1941	X	53. September 1942		83. July 1945	
24. January 1941	X	54. October 1942		84. June 1946	
25. February 1941		55. October 1942		85. November 1947	
26. February 1941		56. November 1942		86. August 1948	
27. February 1941		57. November 1942		87. May 1956	
28. April 1941		58. November 1942		88. October 1956	
29. April 1941		59. December 1942			
30. April 1941		60. March 1943			

"X" denotes seniority positions held by Negro firemen. Unchecked boxes denote seniority positions held by white firemen.

FILE COPY

Office-Supreme Court, U.S.
FILED
DEC 31 1959
JAMES R. BROWNING, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1959.

No. 542.

AL MARSHALL, *et al.*,

Petitioners,

v.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, *et al.*,

Respondents.

BRIEF OF BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

BENNING M. GRICE,
Suite 1010 Bankers Insurance Bldg.,
Macon, Georgia,

RUSSELL B. DAY,
622 Keith Building,
Cleveland 15, Ohio,

HAROLD C. HEISS,
622 Keith Building,
Cleveland 15, Ohio,

Attorneys for Respondent, Brotherhood of Locomotive Firemen and Enginemen.

December 31, 1959.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 1-8647

TABLE OF CONTENTS.

Question Presented	1
Statement of the Case	2
The Supreme Court's Rule Regarding Finality of Findings Concurred in by Two Lower Courts	10
Facts Bearing Upon Petitioners' Charge of Racial Discrimination	13
The Reason Stated by Petitioners for Granting the Writ	33
APPENDIX A	Attached
Chart A	1a
Chart B	7a
Chart C	8a
Chart D	11a
Chart E	12a
Chart F	15a
Chart G	17a
Chart H	19a

TABLE OF CASES.

Allen v. Trust Co. of Ga., 326 U. S. 630 (1946)	11, 12
Baker v. Cummings, 169 U. S. 189 (1898)	11
Baker v. Schofield, 243 U. S. 114 (1917)	11, 12
Brotherhood of Locomotive Engineers v. Chicago, Milwaukee & St. Paul Rd., 41 F. Supp. 751	4
District of Columbia v. Pace, 320 U. S. 698 (1944)	11
Dravo v. Fabel, 132 U. S. 487	10
Dun v. Lumbermen's Credit Assoc., 209 U. S. 20 (1908)	11

Gilson v. United States, 234 U. S. 380 (1914) 11

Goodyear Tire & Rubber Co. v. Ray-O-Vac Co., 321 U. S. 275 (1944) 11

Graver Tank & Mfg. Co. v. Linde Air Products Co., 336 U. S. 271 (1949) 11

Hy-Yu-Tse-Mil-Kin v. Smith, 194 U. S. 401 (1904) 11

Oliphant v. Brotherhood of Locomotive Firemen and Enginemen, 156 F. Supp. 89; 262 F. 2d 359; c. d. 355 U. S. 893 8-9

Rolax v. Atlantic Coast Line RR Co., 91 F. Supp. 985 (1950) 3

Steele v. Louisville & Nashville Railroad Co., 323 U. S. 192 3

Stuart v. Hayden, 169 U. S. 1 (1898) 11

Towan v. Moore, 173 U. S. 17 (1899) 11

Tunstall v. Brotherhood of Locomotive Firemen and Enginemen, 323 U. S. 210 3

United States v. O'Donnell, 303 U. S. 501 (1938) 11

Washington Securities Co. v. United States, 234 U. S. 76 (1914) 11

Williams Manufacturing Co. v. United Shoe Machinery Corp., 316 U. S. 364 (1942) 11

In the Supreme Court of the United States

OCTOBER TERM, 1959.

No. 542.

AL MARSHALL, *et al.*,

Petitioners,

v.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, *et al.*,

Respondents.

BRIEF OF BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

A copy of the petition for writ of certiorari was received by counsel for the respondent Brotherhood through the United States mail on December 2, 1959. The respondent's brief is being filed with the Clerk of this Court within the thirty days allowed by Rule 24 of the Supreme Court Rules.

QUESTION PRESENTED.

The respondent believes the petitioners to be in error when they state that the judgment rendered by the Court of Appeals for the Fifth Circuit on July 2, 1959, in the above-entitled proceeding presents for review by this Court the question propounded by petitioners on page 2 of the petition for certiorari.

The respondent suggests that the judgment rendered by the Court of Appeals, which affirmed the judgment entered by the District Court, poses but one question that could be open for consideration by this Court, to wit:

Are the findings, concurred in by the District Court and by the Court of Appeals, which are adverse to petitioners' contention that they have been singled out for hostile discrimination because of their race, so clearly erroneous that they must be set aside and replaced by findings made by this Court?

STATEMENT OF THE CASE.

This is a civil contempt proceeding. It was instituted by the five petitioners, who moved to intervene in a case before the District Court for the Middle District of Georgia, Macon Division, designated Civil Action No. 711, and entitled *Washington, et al. v. Central of Georgia Railway, et al.* The motion to intervene was accompanied by a petition which requested the District Court to issue a rule nisi to the defendants, Brotherhood of Locomotive Firemen and Enginemen and the Central of Georgia Railway, requiring these parties to show cause why they should not be held in civil contempt for disobeying a permanent injunction that was entered of record in the *Washington* case on March 25, 1952 (R. 5, 7, 22).

The pertinent provisions of the injunction are quoted in the petition for certiorari, beginning at the bottom of page 3. The purpose of this injunction is the prevention of discriminatory treatment of the Negro firemen employed on the Central of Georgia Railway by the Brotherhood and the Central of Georgia Railway in the course of making and enforcing agreements pertaining to rules of employment and working conditions applicable to the firemen's craft. The Brotherhood and the Railway consented to the entry of this injunction in disposition of the *Washington* case. The terms of the injunction were approved by counsel who now represent petitioners in the instant proceeding.

The question posed by the contempt proceeding was whether an agreement between the Brotherhood and the Central of Georgia Railway, dated February 21, 1957, and made effective March 1, 1957, which lowered the limits on mileages that firemen would thereafter be permitted to run in a month in each class of train service, was action of a kind prohibited by the terms of the injunction. In resolving this issue, there was no occasion for the District Court to look to the decisions of this Court in the *Steele* and *Tunstall** cases, or to interpret the Railway Labor Act. The essential facts bearing upon the lowering of the mileage limitations of which petitioners complain are as follows.

Prior to March 1, 1957, the firemen's collective agreement on the Central of Georgia Railway contained the following rules designed to regulate the mileage that firemen would be permitted to accumulate in one month when working in passenger, freight, or yard service:

> "In the regulation of assigned or extra passenger service, a sufficient number of men will be assigned to keep the mileage or equivalent thereof within the limitations of 4,000 and 4,800 miles per month; in assigned, pooled, chain-gang or any other service paying freight rates, a sufficient number of firemen will be assigned to keep the mileage or the equivalent thereof within the limitations of 3,200 and 3,800 miles per month. Neither the maximum nor the minimum is guaranteed.

---

* 323 U. S. 192 and 214. Space in this brief is not devoted to answering the misstatements by petitioners at page 3 of their petition, for the Justices of this Court know that the issue decided by this Court in the *Steele* and *Tunstall* cases was raised by a challenge to the legal sufficiency of the allegations in the complaints to state a cause of action, and the ruling by this Court in those cases did not preclude a subsequent trial on the merits, as occurred in *Rolax v. Atlantic Coast Line RR Co.*, 91 F. Supp. 985 (1950).

"In assigned yard service regulation will be made by requiring each regularly assigned man to lay off when he has earned 35 days or its equivalent per month. To keep within the mileage regulations set forth in this section, additional crews may be added or swing men used to relieve the regular men on specified days. If regulation cannot be made as provided herein, men will be required to lay off so that the equivalent of 4,800 miles in passenger service, or 3,800 miles in other assigned service, will not be exceeded." (R. 187-188.)

These rules were originally part of an agreement between the Firemen's and Engineers' Brotherhoods, effective as long ago as 1918, and which became known throughout the railway industry as the Chicago Joint Agreement (R. 198). The language of these rules has become standard terminology in the firemen's and engineers' collective agreements throughout the railway industry (R. 198, 347). Rules limiting the amount of mileage engineers and firemen are allowed to run in a month provide the means by which engineers and firemen near the top of the seniority rosters are prevented from "hogging all the mileage." (R. 186, 466-467.) This insistence by the senior firemen and engineers on "hogging" the available mileage is not limited to any race, but is common to senior engineers and firemen generally. This identical struggle between engineers and senior firemen, on the one hand, and junior firemen on the other hand, has waged continuously down through the years. The decision in *Brotherhood of Locomotive Engineers v. Chicago, Milwaukee & St. Paul Rd.*, 41 F. Supp. 751, provides a comprehensive summary of the methods and technique involved in this contest, undistorted by the racial issue.

High mileage is not synonymous with high seniority. The firemen's collective agreements contain no provision

entitling senior firemen to insist on accumulating greater mileage in a month than a junior fireman may earn, and the petitioners make no claim based on such a rule. High seniority merely enables a fireman to outbid junior firemen for a job having a feature or features that the senior fireman prefers.

The February 21, 1957, agreement made no change in the language of the standard mileage rules as quoted, *supra*. The agreement simply reduced the *minimum* mileages prescribed by the rules. The minimum in passenger service was reduced from 4000 to 3800 miles per month. The minimum in freight service was reduced from 3200 miles per month to 3000 miles. In yard service the number of days of work for which yardmen would be permitted to obtain credit was reduced from 35 to 26 days per month (R. 32, 192).

The second paragraph of the mileage regulation rules, quoted *supra*, states that in regulating the firemen's mileage between the maximum and minimum limits prescribed by the rules, "swing men" may be "used to relieve the regular men on specified days." This is the method of mileage regulation used when two or more firemen are assigned to trains that operate on an established schedule, provided the addition of the swing man does not reduce the available mileage for each man below the minimum limit. The "swing man" replaces each of the regularly assigned men on specified days of the month. The addition of a "swing man" to a group of firemen assigned to jobs on scheduled runs is *one* of the standard methods of regulating mileage used on all railroads throughout the country (R. 348-349).

Each of the five petitioners for many years prior to March 1, 1957, had been running 3760 miles per month. This was just 40 miles per month below the *maximum* per-